

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

LUIS GALEGO,

Plaintiff,

vs.

BRUCE BANNISTER, et al.,

Defendants.

3:10-cv-00468-LRH (WGC)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Defendants renewed Motion for Summary Judgment. (Doc. # 35.)¹ After a thorough review, the court recommends that Defendants' motion be granted.

I. BACKGROUND

At all relevant times, Plaintiff Luis Galego (Plaintiff) was an inmate in custody of the Nevada Department of Corrections (NDOC). (Pl.'s Compl. (Doc. #11) at 1.) The events giving rise to this action took place at Lovelock Correctional Center (LCC), although Plaintiff currently resides at Ely State Prison (ESP). (*Id.*, Doc. # 59.) Plaintiff, a *pro se* litigant, brings this action pursuant to 42 U.S.C. § 1983. (Doc. # 11.) Defendants are Dr. John Scott and Nursing Director Don Poag. (*See* Screening Order (Doc. # 10) at 3-4.)

On screening, the court determined that Plaintiff sets forth a colorable Eighth Amendment claim for deliberate indifference to a serious medical need. (Doc. # 10.)

¹Refers to court's docket number.

1 Specifically, Plaintiff alleges that he suffers from severe chest pain, pain in his left lung,
2 shortness of breath, high blood pressure, and has a family history of heart problems. (Doc.
3 # 11 at 3-4, 6-8.) He claims that Dr. Scott examined him, and after a quick, but limited
4 symptom check, concluded Plaintiff has no heart problems. (*Id.* at 4, 6.) He also alleges
5 that Don Poag responded to his medical kite by stating that Plaintiff refused Dr. Scott's
6 recommendations, which Plaintiff claims is untrue. (*Id.* at 4.)

7 On June 2, 2011, Defendants filed a Motion for Summary Judgment, arguing:
8 (1) they were not deliberately indifferent to Plaintiff's serious medical needs; (2) Defendants
9 cannot be sued in their official capacity; and (3) they are entitled to qualified immunity.
10 (Doc. # 35 at 5-11.)

11 On December 20, 2011, the court issued a Report and Recommendation that
12 Defendants' motion be granted in part and denied in part. (Doc. # 61.) The court
13 recommended that Defendants' motion be granted insofar as Plaintiff asserts official
14 capacity damages claims against them. (Doc. # 61 at 6-7.) The court found, however, that
15 Defendants were not entitled to summary judgment on the Eighth Amendment claim
16 because they failed to authenticate any of the exhibits filed in support of their motion. (*See*
17 *id.* at 6.) The court also found that Defendants were not entitled to qualified immunity.
18 (*See id.* at 7-8.)

19 On January 12, 2012, Defendants filed an objection to the Report and
20 Recommendation. (Doc. # 64.) Defendants conceded the propriety of the court's
21 recommendation that the motion be denied as a result of Defendants' failure to authenticate
22 the evidence filed in support of their motion, but submitted declarations authenticating the
23 evidence, and asked that the district court review the motion with this new evidence in
24 mind. (Doc. # 64.) Specifically, Defendants submitted declarations authenticating the
25 evidence filed in support of their motion, including: (1) Plaintiff's medical records (Exhibit
26 A); (2) Plaintiff's Offender Movement History Report (Exhibit C); and Plaintiff's Inmate
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1 Issue History (Exhibit D).² (See Doc. # 64 at 11-15.)

2 On February 17, 2012, the Honorable Larry R. Hicks, United States District Judge,
3 conducted a de novo review, declined to consider the new evidence submitted by
4 Defendants, and entered an order adopting the Report and Recommendation. (Doc. # 66.)

5 On March 22, 2012, the court held a status conference in this action, and determined
6 that reconsideration of Defendants' Motion for Summary Judgment (Doc. # 35) in
7 connection with the declarations provided in connection with their objection to
8 authenticate the evidence supporting the motion, is appropriate. (See Docs. # 78, # 79.)
9 The court further determined that the parties need not submit further briefing, as the
10 motion had been fully briefed, and Plaintiff had an opportunity to review and respond to
11 the evidence (see Doc. # 47, construed as Plaintiff's opposition), without the accompanying
12 authenticating declarations. (*Id.*)

13 **II. LEGAL STANDARD**

14 "The purpose of summary judgment is to avoid unnecessary trials when there is no
15 dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*,
16 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). All reasonable inferences are drawn in
17 favor of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Summary judgment is
19 appropriate if "the pleadings, the discovery and disclosure materials on file, and any
20 affidavits show that there is no genuine issue as to any material fact and that the movant is
21 entitled to judgment as a matter of law." *Id.* (quoting Fed.R.Civ.P. 56(c)). Where reasonable
22 minds could differ on the material facts at issue, however, summary judgment is not
23 appropriate. See *Anderson*, 477 U.S. at 250.

24 The moving party bears the burden of informing the court of the basis for its motion,
25 together with evidence demonstrating the absence of any genuine issue of material fact.
26 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Although the parties may submit

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28 ² Defendants subsequently withdrew Exhibit B. (See Doc. # 65.)

1 evidence in an inadmissible form, only evidence which might be admissible at trial may be
2 considered by a trial court in ruling on a motion for summary judgment. Fed.R.Civ.P.
3 56(c).

4 In evaluating the appropriateness of summary judgment, three steps are necessary:
5 (1) determining whether a fact is material; (2) determining whether there is a genuine issue
6 for the trier of fact, as determined by the documents submitted to the court; and (3)
7 considering that evidence in light of the appropriate standard of proof. *See Anderson*, 477
8 U.S. at 248-250. As to materiality, only disputes over facts that might affect the outcome of
9 the suit under the governing law will properly preclude the entry of summary judgment;
10 factual disputes which are irrelevant or unnecessary will not be considered. *Id.* at 248.

11 In determining summary judgment, a court applies a burden shifting analysis.
12 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it
13 must come forward with evidence which would entitle it to a directed verdict if the evidence
14 went uncontroverted at trial.’” In such a case, the moving party has the initial burden of
15 establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R.*
16 *Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal
17 citations omitted). In contrast, when the nonmoving party bears the burden of proving the
18 claim or defense, the moving party can meet its burden in two ways: (1) by presenting
19 evidence to negate an essential element of the nonmoving party’s case; or (2) by
20 demonstrating that the nonmoving party failed to make a showing sufficient to establish an
21 element essential to that party’s case on which that party will bear the burden of proof at
22 trial. *See Celotex*, 477 U.S. at 323-25. If the moving party fails to meet its initial burden,
23 summary judgment must be denied and the court need not consider the nonmoving party’s
24 evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970).

25 If the moving party satisfies its initial burden, the burden shifts to the opposing party
26 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
27 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual
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dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)(quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *Id.* Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See* Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324.

At summary judgment, a court’s function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. While the evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in its favor,” if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249-50, 255 (citations omitted).

III. DISCUSSION

A. EIGHTH AMENDMENT DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEED

A prisoner can establish an Eighth Amendment violation arising from deficient medical care if he can prove that prison officials were deliberately indifferent to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). “The requirement of deliberate indifference is less stringent in cases involving a prisoner’s medical needs than in other cases involving harm to incarcerated individuals because ‘[t]he State’s responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.’” *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992), *rev’d on other grounds*, *WMX Tech., Inc. v. Miller*, 104 F.3d. 1133 (9th Cir. 1997). “In deciding whether there has been deliberate indifference to an inmate’s serious medical needs, [the

1 court] need not defer to the judgment of prison doctors or administrators.” *Hunt v. Dental*
2 *Dep’t*, 865 F.2d 198, 200 (9th Cir. 1989).

3 A finding of deliberate indifference involves the examination of two elements: “the
4 seriousness of the prisoner’s medical need and the nature of the defendant’s responses to
5 that need.” *McGuckin v. Smith*, 974 F.2d at 1059. “A ‘serious’ medical need exists if the
6 failure to treat a prisoner’s condition could result in further significant injury or the
7 ‘unnecessary and wanton infliction of pain.’” *Id.* (citing *Estelle*, 429 U.S. at 104). Examples
8 of conditions that are “serious” in nature include “an injury that a reasonable doctor or
9 patient would find important and worthy of comment or treatment; the presence of a
10 medical condition that significantly affects an individual’s daily activities; or the existence of
11 chronic and substantial pain.” *Id.* at 1059-60; *see also Lopez v. Smith*, 203 F.3d 1122, 1131
12 (9th Cir. 2000) (quoting *McGuckin* and finding that inmate whose jaw was broken and
13 mouth was wired shut for several months demonstrated a serious medical need).

14 If the medical needs are serious, Plaintiff must show that Defendants acted with
15 deliberate indifference to those needs. *Estelle*, 429 U.S. at 104. “Deliberate indifference is a
16 high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). Deliberate
17 indifference entails something more than medical malpractice or even gross negligence. *Id.*
18 Inadvertence, by itself, is insufficient to establish a cause of action under § 1983.
19 *McGuckin*, 974 F.2d at 1060. Instead, deliberate indifference is only present when a prison
20 official “knows of and disregards an excessive risk to inmate health or safety; the official
21 must both be aware of the facts which the inference could be drawn that a substantial risk of
22 serious harm exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S.
23 825, 837 (1994); *see also Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) (quoting
24 *Farmer*, 511 U.S. at 858). “Prison officials are deliberately indifferent to a prisoner’s serious
25 medical needs when they deny, delay, or intentionally interfere with medical treatment” or
26 the express orders of a prisoner’s prior physician for reasons unrelated to the medical needs
27 of the prisoner. *Hunt v. Dental Dep’t.*, 865 F.2d 198, 201 (9th Cir. 1989) (internal
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1 quotation marks and citation omitted). Where delay in receiving medical treatment is
2 alleged, a prisoner must demonstrate that the delay led to further injury. *McGuckin*, 974
3 F.2d at 1060.

4 In addition, a prison physician is not deliberately indifferent to an inmate's serious
5 medical need when the physician prescribes a different method of treatment than that
6 requested by the inmate. *See McGuckin*, 974 F.2d at 1059 (explaining that negligence in
7 diagnosing or treating a medical condition, without more, does not violate a prisoner's
8 Eighth Amendment rights); *see also Snow v. McDaniel*, 681 F.3d 978, 987
9 (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)); *Franklin v. Oregon*, 662 F.2d
10 1337, 1344 (9th Cir. 1981) (difference of opinion between a prisoner-patient and medical
11 staff regarding treatment is not cognizable under § 1983). To establish that a difference of
12 opinion amounted to deliberate indifference, the inmate "must show that the course of
13 treatment the doctors chose was medically unacceptable under the circumstances" and that
14 the course of treatment was chosen "in conscious disregard of an excessive risk to [the
15 prisoner's] health." *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (citations
16 omitted); *see also Snow*, 681 F.3d at 988 (quoting *Jackson*, 90 F.3d at 332) (finding that "a
17 reasonable jury could conclude that the decision of the non-treating, non-specialist
18 physicians to repeatedly deny the recommendations for surgery was medically unacceptable
19 under the circumstances").

20 **B. SUMMARY OF RELEVANT EVIDENCE**

21 At all relevant times, defendant Scott was the Senior Physician at LCC, and
22 defendant Poag was the Director of Nursing Services. (Doc. # 35 at 3 ¶¶ 3-4.)

23 On June 30, 2009, Plaintiff requested an appointment with defendant Scott for
24 complaints of chest pain and trouble breathing. (Doc. # 36-7 at 12.)

25 On July 15, 2009, Plaintiff requested an appointment with defendant Scott
26 concerning chest pain and trouble breathing. (Doc. # 36-7 at 6.) He was scheduled for an
27 appointment on July 22, 2009. (*Id.*)
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1 Plaintiff was seen by defendant Scott for complaints of chest pain on July 23, 2009.
2 (Doc. # 36-8 at 13.) Defendant Scott performed a physical examination as well as an EKG
3 and noted that Plaintiff's breath sounded clear. (*Id.* at 12-13.) Defendant Scott assessed
4 Plaintiff as having had a panic attack and recommended that he see a psychiatrist. (*Id.*)
5 Plaintiff refused defendant Scott's recommendation. (*Id.*)

6 On August 10, 2009, Plaintiff sent a kite to defendant Scott asking for a refill of his
7 medication for his chest pain. (Doc. # 36-7 at 1.) On October 21, 2009, Plaintiff sent a
8 medical kite to defendant Poag asking for a practitioner to look into his complaints of chest
9 pain. (Doc. # 36-6 at 3.) He was told he would be scheduled for the next clinic. (*Id.*)

10 On February 14, 2010, Plaintiff sent a medical kite to defendant Poag asking when he
11 would be seen by a specialist for his chest pain. (Doc. # 36-5 at 1.) He was told he would
12 see a specialist the next time there was a visiting provider clinic at LCC. (*Id.*)

13 On February 21, 2010, Plaintiff called a "man down" to be taken to the infirmary and
14 was seen by medical staff for complaints of chest pain and dizziness. (Doc. # 36-2 at 3.)
15 Plaintiff's vitals were checked and his lab work was ordered. (*Id.*, Doc. # 36-8 at 11.)
16 Plaintiff was given medication and it was noted that his pain had decreased but was still
17 present. (*Id.*) Plaintiff was admitted to the infirmary for observation. (*Id.*) Later that day,
18 Plaintiff denied any chest pain, and reported feeling better. (Doc. # 36-8 at 11.) His heart
19 rate was regular and he was taking meals and fluids well. (*Id.*) He continued to be
20 monitored while medical staff awaited his lab results. (*Id.*) Even later in the day, Plaintiff
21 denied chest pain again. (*Id.*) He continued to be observed and was instructed to see
22 defendant Scott the following day. (*Id.*)

23 The next day, February 22, 2010, Plaintiff was examined by defendant Scott, who
24 ordered that he could be discharged from the infirmary. (Doc. # 36-8 at 10.) Plaintiff then
25 acted agitated toward nursing staff and asserted that he was being denied proper care.
26 (Doc. # 36-8 at 10.) As a result, Plaintiff was kept in the infirmary and was instructed to
27 follow up with defendant Scott the next day. (*Id.*)
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1 On February 24, 2010, Plaintiff was seen by defendant Scott. (Doc. # 36-8 at 10.)
2 Plaintiff's EKG and lab results were normal. (*Id.*) Defendant Scott diagnosed Plaintiff as
3 having atypical chest pain caused by anxiety disorder, and cleared him to be released from
4 the infirmary when bed space was available. (*Id.*)

5 On March 1, 2010, Plaintiff sent a medical kite to defendant Scott asking for an
6 appointment to check out his chest pain. (Doc. # 36-4 at 3.) He also sent a kite to defendant
7 Poag stating that he had serious chest pain and did not feel well. (Doc. # 36-4 at 14.) Nurse
8 Hegge responded asking whether Plaintiff was requesting an appointment. (*Id.*)

9 Plaintiff was seen on March 4, 2010 by Dr. Mar, who diagnosed him with atypical
10 chest pain due to anxiety. (Doc. # 36-8 at 8-9.) Like defendant Scott, Dr. Mar
11 recommended that Plaintiff see a psychiatrist for his anxiety. (*Id.*)

12 On April 6, 2010, Plaintiff called another "man down," complaining of chest pain and
13 dizziness. (Doc. # 36-2 at .) He was transported to medical, but was noted as appearing
14 calm. (*Id.*) He was referred to defendant Scott to perform an EKG and other lab tests. (*Id.*)
15 He was admitted to the infirmary. (*Id.*) Plaintiff was seen by nursing staff in the infirmary,
16 who noted that he was resting comfortably and that his vital signs were normal. (Doc. # 36-
17 8 at 7.) Defendant Scott subsequently ordered him released from the infirmary. (*Id.*)

18 On April 20, 2010, a "man down" was called for Plaintiff after he was talking to an
19 officer and became angry about a bed move. (Doc. # 36-2 at 1.) He was to be admitted to
20 the infirmary and referred to a doctor. (*Id.*) Plaintiff was examined by defendant Scott at
21 the clinic, who found that his vital signs were normal. (Doc. # 36-8 at 8.) Defendant Scott
22 noted that Plaintiff appeared to be conscious but refused to respond verbally. (*Id.*)
23 Defendant Scott diagnosed Plaintiff with atypical chest pain, and he was transferred to the
24 infirmary. (*Id.*) Plaintiff remained in the infirmary until May 21, 2010. (*Id.* at 5-8.)
25 During this time he received care and monitoring for his chest condition. (*Id.*)

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C. ANALYSIS

Assuming without deciding that Plaintiff suffers from a serious medical need, the court finds that there is no evidence of deliberate indifference on the part of Defendants. When Plaintiff complained of or manifested problems related to chest pain or shortness of breath, he was seen and given prompt medical attention. Tests were ordered, he was monitored, and he was given medication where indicated. It was defendant Scott's opinion that Plaintiff's chest pain was caused by anxiety, and Plaintiff refused his recommendations to see a psychiatrist. Plaintiff's opinion that his chest pain was caused by something else is not sufficient to raise a genuine issue of material fact. A difference of opinion regarding a course of treatment can only amount to deliberate indifference if it is established that the chosen course of treatment was medically unacceptable under the circumstances, and that evidence has not been presented to the court. Accordingly, summary judgment should be entered in favor of Defendants.

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IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an Order granting Defendants' renewed Motion for Summary Judgment (Doc. # 35).

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District Court's judgment.

DATED: July 16, 2012.


WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE